87-608

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

———

GEORGE W. MCMANUS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

———

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QUESTION PRESENTED

1. In 1976, Congress flatly prohibited federal prosecutors from using tax returns filed by third-party witnesses to impeach their testimony in tax proceedings. 26 U.S.C. §§ 6103(h)(2) & (4). The question presented in this case is whether petitioner was deprived of a fair trial by the prosecution's repeated violation of those statutory provisions, in obtaining and using the confidential federal income tax returns filed by defense witnesses to cross-examine those witnesses for impeachment purposes, and by the trial court's unlawful admission of such tax returns in evidence.

LIST OF PARTIES

The parties to the proceedings below, a criminal tax prosecution, were the petitioner George W. McManus, Jr. and the respondent the United States of America.

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The petitioner George W. McManus, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceedings on August 3, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit has not been reported. It is reprinted in the Appendix hereto at pp. 1a-4a, *infra*. The Court of Appeals denied a timely Petition For Rehearing And Suggestion For Rehearing In Banc on September 1, 1987, in an Order reprinted in the Appendix at pp. 5a-6a, *infra*.

The question presented in this Petition was not addressed in any opinion of the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered on August 3, 1987. A timely Petition For Rehearing And Suggetsion For Rehearing In Banc was denied in an Order dated September 1, 1987. This Petition is filed within sixty days of the entry of that Order. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 20.1.

STATUTE INVOLVED

The question presented by this Petition involves violations during petitioner's trial of § 6103(h) of the Internal Revenue Code, 26 U.S.C. § 6103(h), enacted by the Tax Reform Act of 1976, Pub. L. No. 94-455, § 1202, 90 Stat. 1667. Section 6103(h) is lengthy, and the pertinent statutory text is reprinted in the Appendix hereto, at pp. 7a-10a, *infra*.

STATEMENT OF THE CASE

On June 12, 1986, a Grand Jury sitting in the District of Maryland indicted petitioner George W. McManus, Jr., a Baltimore attorney, on four counts alleging federal income tax violations. The Indictment charged petitioner with filing false federal income tax returns and with income tax evasion for the tax years 1979 and 1980, in violation of 26 U.S.C. §§ 7201 and 7206(1). The Indictment alleged that petitioner attempted to evade taxes totalling approximately $550,000.00 during that two-year period. App. 7-11.[1]

The case proceeded to trial before a jury commencing October 1, 1986. On October 16, 1986, the jury returned a verdict of guilty on all four counts. On December 2, 1986, the District Court (Joseph H. Young, J.) sentenced

[1] The Appendix filed in the Court of Appeals will be designated herein as "App." References to the Trial Transcript will be designated "Tr."

Mr. McManus to a term of imprisonment of two years, fines totalling $20,000.00, and a period of probation of four years. As a condition of probation, Judge Young required Mr. McManus to perform 2500 hours of community service. App. 23-24.

During the trial petitioner conceded that his 1979 and 1980 tax returns failed to include substantial income he had received from his law practice and interest he had earned from a number of bank accounts. The focus of the trial was whether those omissions had been caused by the willful perpetration of a scheme to evade taxes, as the prosecution contended, or instead had resulted from petitioner's inattention to his tax returns, and his reliance on a bookkeeper who had negligently failed to maintain and provide to his accountant all the information needed for the adequate preparation of complete returns. *See* Appendix, p. 2a, *infra.*

The certified public accountant who prepared petitioner's returns testified that he had relied almost exclusively on the bookkeeper for information regarding petitioner's income. Tr. Vol. IV, pp. 22-23, 44-45, 48, 92. The bookkeeper testified that she had failed to maintain complete ledgers of all Mr. McManus' earnings, and had failed to bring to the accountant's attention bank records which would have revealed the additional legal fees received by Mr. McManus and the interest earned from numerous bank accounts. Tr. Vol. VI, pp. 83-88, 95-96, 111-114. Petitioner took the witness stand in his own defense, and testified that he had paid only fleeting attention to his personal income tax returns, and had signed them without review each year as his bookkeeper presented them to him. Tr. Vol. IX, pp. 87-89.

The defense's evidence that petitioner had not willfully falsified his income tax returns was buttressed by the testimony of numerous additional witnesses, many of whom worked in his law offices during the years in question. First, petitioner's bookkeeper, Mrs. Miller, tes-

tified that she was to blame for the glaring errors in the returns that were filed, and that she had not recognized the need to present to the accountant the records from numerous bank accounts. Tr. Vol. VI, pp. 113-119, 193-195. A paralegal in the office, Ms. Davidson, testified that when she assumed responsibility for the administration of several estates and trusts managed by the law firm, she discovered that Mrs. Miller, who formerly had handled these duties, had not recognized the need for those entities also to file fiduciary returns on their investment income, or to bring to the attention of Mr. McManus' accountants the records concerning the income received by those entities. Tr. Vol. VI, pp. 23-25, 28-30.

Every witness who was familiar with petitioner's practice and his work habits testified that he devoted his attention almost exclusively to the needs of his clients and cases, having little time for the administration of the law office or attendance to his personal affairs. Petitioner was described at trial as a "workaholic" who typically worked in excess of eighty hours a week, who was constantly in court, and who, if need be, would agree to meet with clients to discuss their problems during all hours of the night. *E.g.*, Tr. Vol. VI, pp. 207-208; Vol. VII, pp. 29-38; 86-87, 90-94. Among those who so testified were two young lawyers associated with Mr. McManus during the time period framed by the Indictment. One of them, Mr. Mayer, testified that he recalled a specific occasion when, deep in a discussion with him about a pending case, petitioner was interrupted by Mrs. Miller with the need to sign his federal income tax return. Mr. Mayer remembered that petitioner signed the return without reading it, pausing only long enough to locate the line on which to sign his name. Tr. Vol. VII, pp. 30-32.

The prosecution sought to impeach these defense witnesses on cross-examination by attempting to show that

they themselves had failed to report as income all the wages they earned from the McManus law firm. By the end of the trial it was apparent that during the investigation of this case the prosecution had obtained from the Internal Revenue Service ("IRS") tax returns filed by many, if not all, of petitioner's employees during the years in question. The evidence presented by the prosecution relating to the tax returns of third-party witnesses included the following:

During the second day of trial the defense informed the trial court that discovery provided by the prosecution indicated that a former secretary at the McManus law firm would be testifying under a grant of immunity because for many years she had not reported to the IRS the income she had earned as a part-time employee of the firm. App. 36-37. Despite the defense's assurances that it had no intention of cross-examining this witness about her tax problems, or about her grant of immunity, the court ruled that the prosecution would not be precluded from eliciting from this witness on direct examination both her immunity agreement and the nature of her own tax problems. App. 36-42. Over defense objection, this former secretary testified on direct that she had not reported her income from the law firm over a period of twelve years. App. 46. On cross-examination, her testimony concerning petitioner's work habits and the general chaos prevalent in his office was favorable to the defense. With respect to her own tax problems, she testified that she had never discussed with petitioner her failure to report her wages to the IRS. App. 48. No evidence ever was presented to demonstrate petitioner's knowledge of her tax practices.

Mrs. Davidson, who offered the favorable testimony for the defense described above, was confronted on cross-examination with her tax returns for the years 1979 and 1980. She was forced to admit from the stand that she had not reported as income the wages she had earned

from the law firm as a part-time paralegal during those years, even though she had testified on direct that she had reported that income. Her tax returns were admitted in evidence. App. 119-121.

Mrs. Miller was questioned by the prosecution on cross-examination at greath length about her direct testimony that she had performed bookkeeping tasks for the McManus firm for many years without salary. She testified that she neither expected nor sought compensation for her work because of her close friendship with petitioner and his family, and because of her gratitude for the substantial legal services he had provided without charge to her and her eight children over the course of many years following the untimely death of her husband. When the prosecution offered in evidence her federal income tax returns from 1978 through 1980, to demonstrate that she had in fact reported no income from petitioner, the defense objected. The court ruled these returns inadmissible because they did not impeach Mrs. Miller's testimony that she had received no salary from the McManus firm. App. 124-126.

Following the critical testimony offered by Mr. Mayer concerning petitioner's demonstrated lack of attention to his tax returns, he was cross-examined at great length about the salary he received from petitioner, and about the wages his wife had earned as a part-time clerical at the law firm. App. 128-132. The prosecution attempted to prove that the Mayers had not included Mrs. Mayer's wages ($48 per week) on Schedule C of their 1978 and 1979 returns. Their joint income tax returns for those years were admitted in evidence over defense objection. App. 132.

Another former associate in the McManus office offered favorable testimony concerning petitioner's character, and the confusion and chaos that reigned in his law office. He also was cross-examined by the prosecution

about his reporting of income to the IRS. The prosecutor asked: "So you found time to report all your income, right? You didn't have any problems with that, did you?" The witness responded: "I hope so." Apparently, this witness's returns were in order, for the prosecutor then remarked: "That's . . . no more questions on that area. *For you.*" App. 135-136 (emphasis added).

There was no evidence presented to suggest that Mr. McManus was involved in any way in the preparation or filing of his employees' tax returns. The prosecution never demonstrated any plausible connection between the employees' tax practices and the allegations contained in the Indictment. In its handling of defense objections to the admission of these tax returns, the trial court indicated that it viewed the witnesses' returns as admissible, if at all, solely for purposes of impeaching the credibility of their testimony. App. 126.

On appeal, the petitioner contended that he was deprived of a fair trial, *inter alia*, by the prosecution's misuse of the confidential tax returns of third-party witnesses, and by the trial court's admission of those returns in evidence, because Congress expressly had prohibited the disclosure and use of tax returns to impeach the credibility of third-party witnesses when it enacted § 6103(h) of the Internal Revenue Code. Respondent countered with a three-part defense of its violations of federal law in obtaining the confidential returns of potential defense witnesses from the IRS and in successfully urging their admission in evidence during petitioner's trial. First, respondent noted that the defense's objections at trial did not specifically refer to the confidentiality provisions of § 6103(h). Second, respondent argued that its use of third-party returns was "limited," and did not violate the statute. Finally, respondent contended that the defense was not greatly prejudiced by any governmental misconduct, and that requiring a new trial would not be an appropriate remedy under the circumstances. *See* Brief For Appellee, at 11-21.

Petitioner conceded on appeal that the defense had not informed the trial court that the prosecution had violated § 6103(h) in obtaining and using the tax returns of third-party witnesses to impeach their testimony, or that the court also had violated the statute in admitting several witnesses' returns in evidence.[2] Petitioner urged the Court of Appeals to reach the merits of this issue for several reasons: *First*, while the defense and the trial court had no reason to know that the prosecution had violated federal law during the investigation and trial of this case, both the statute and applicable Treasury Department regulations placed the United States Attorney's Office on notice that the receipt and use of confidential tax returns and return information to impeach the testimony of third-party witnesses was unlawful. *See* 26 U.S.C. §§ 6103(h)(2) & (3); Treas. Reg. (26 C.F.R.) § 301.6103(h)(2)-1 (1980). *Second*, petitioner argued that under the "plain error" standard of Fed. R. Crim. P. 52(b), the prosecution's repeated violations of federal law to obtain this conviction should be examined and corrected because it was a " 'particularly egregious error[,]' " undetected at trial, which " 'seriously affect[ed] the fairness, integrity [and] public reputation of judicial proceedings.' " *United States* v. *Young*, 470 U.S. 1, 15 (1985) (quoting *United States* v. *Frady*, 456 U.S. 152, 163 (1982), and *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)). *See* Reply Brief For Appellant, at 3-7.

In a brief per curiam opinion, the Court of Appeals summarily disposed of each issue raised on appeal by petitioner, and affirmed his conviction. With respect to

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[2] Petitioner's counsel had objected at trial, on several occasions, to the prosecution's offers of evidence regarding the tax practices of petitioner's employees, but had not raised the statutory violation as a specific ground of objection. Petitioner argued on appeal that the defense had not realized that the statute had been violated until after the trial had ended. Reply Brief For Appellant, at 5.

the question presented here, the Court failed even to mention § 6103(h) in its haste to affirm. The Court's treatment of this question, in its entirety, reads as follows:

> [A]ppellant claims that he was deprived of a fair trial by the prosecution's use of tax returns of third party witnesses and the court's admission of some of those returns into evidence. We find no merit in this argument. Appellant failed to comply with Federal Rule of Evidence 103 because he failed to object in a way that stated the specific ground of objection. Thus, the disclosure issue was never raised before Judge Young. In addition to appellant's failure to preserve the issue for appeal, *the limited use of the returns was fair and proper.* Appendix, p. 2a, *infra.* (Emphasis added.)

REASONS FOR GRANTING THE WRIT

In 1976, Congress expressly prohibited federal prosecutors from obtaining and using the tax returns of witnesses to impeach their trial testimony. 26 U.S.C. §§ 6103(h)(2) & (4). The Court of Appeals in this case has interpreted that statute in a manner that eviscerates its essential meaning and purpose. By holding that the prosecution's public disclosure of the tax returns of third-party witnesses to impeach their trial testimony was both "limited," and "fair and proper," the Court of Appeals has turned back the clock to an era when the government's unrestrained use of confidential taxpayer information gathered by the IRS had led to such widespread abuses that Congress was required to intervene. The Court of Appeals' ruling also raises the spectre of future criminal trials in which witnesses who testify for the defense may thereby subject themselves to unauthorized audits of their tax returns by federal prosecutors, and to public examinations into the accuracy of their returns in the setting of another man's trial—without notice, without counsel, and without a fair opportunity to defend themselves.

If the practices condoned during this trial by the district court, and winked at by the Court of Appeals, ever were permitted to become commonplace, few defendants would be able to obtain the voluntary cooperation of witnesses who otherwise would have favorable testimony to offer. The potential chilling effect on defense witnesses is obvious. The fundamental Sixth Amendment right of a defendant to obtain the testimony of witnesses in his favor is no less implicated by the events of petitioner's trial, and by the Court of Appeals' affirmance of his conviction.

The prosecution in this case unlawfully obtained from the IRS the tax returns of many potential defense witnesses, and used that confidential information to overwhelming advantage in neutralizing or destroying the impact of favorable testimony those witnesses offered for the defense. The prosecution thereby spawned a new tool of courtroom intimidation, which Congress expressly had interdicted but the Court of Appeals nonetheless held to be "fair and proper." The trial judge permitted the prosecution free use of this offensive cross-examination technique. The Court of Appeals approved the prosecution's conduct, despite a clear Congressional mandate that, if fairly addressed, should have led only to the conclusion that petitioner's right to a fair trial had been violated.

In the Tax Reform Act of 1976, Pub. L. No. 94-455, § 1202, 90 Stat. 1667, Congress enacted § 6103 of the Internal Revenue Code, which was intended to "provide[] definitive rules relating to the confidentiality of tax returns, an area where there has been much abuse in the past." S. Rep. No. 94-938, 94th Cong., 2d Sess. 19 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 3439, 3455.[3]

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[3] Section 6103 was enacted in direct response to a pattern of abuses by the Executive Branch of the confidentiality of tax returns that was exposed during Congressional investigations of the Nixon Presidency. *See Rueckert* v. *Internal Revenue Service*, 775 F.2d 208, 210 (7th Cir. 1985).

Subsection (h) of § 6103 specifically governs disclosure by the IRS of tax returns and return information to the Department of Justice for use in tax-related civil and criminal investigations and trials, and by courts in connection with the trial of tax proceedings. With respect to the Department of Justice, § 6103(h)(2) provides:

> "In a matter involving tax administration, a return or return information shall be open to inspection by or disclosure to officers and employees of the Department of Justice (including United States attorneys) personally and directly engaged in, and solely for their use in, any proceeding before a Federal grand jury or preparation for any proceeding (or investigation which may result in such a proceeding) before a Federal grand jury or any Federal or State court, *but only if*—
>
> > "(A) *the taxpayer is or may be a party to the proceeding*, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability in respect of any tax imposed under this title;
> >
> > "(B) *the treatment of an item reflected on such return is or may be related to the resolution of an issue in the proceeding or investigation*; or
> >
> > "(C) *such return or return information relates or may relate to a transactional relationship between a person who is or may be a party to the proceeding and the taxpayer which affects, or may affect, the resolution of an issue in such proceeding or investigation.*"

26 U.S.C. § 6103(h)(2) (emphasis added).

Subsection (4) of § 6103(h) governs those instances in which tax returns may be disclosed or admitted in evidence during judicial proceedings pertaining to tax administration, including the trial of criminal tax offenses.

It heightens the standards of confidentiality set forth in paragraphs (B) and (C) of § 6103(h)(2) by requiring that disclosure of third-party returns may only be made when the return "is directly related to" or "directly affects the resolution of an issue in the proceeding." *See* 26 U.S.C. §§ 6103(h)(4)(B) & (C).

These detailed statutory provisions were violated by the prosecutors and by the trial court in this case. The tax returns used by the prosecutors and admitted in evidence were filed by third-party witnesses, not parties to this proceeding. Moreover, the witnesses' tax treatment of their income from the McManus law firm was not directly related to the resolution of any issue in this criminal tax case, as is required by §§ 6103(h)(4)(B) & (C). Rather, the tax returns were used, and admitted by the court, solely to impeach the witnesses' credibility.[4] That Congress prohibited such use of third-party tax re-

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[4] On appeal respondent argued that the witnesses' tax returns were properly offered for the "limited purpose" of proving the petitioner's intent, knowledge, and willfulness with respect to the omissions of income on his own returns. Respondent contended that the evidence at trial demonstrated that petitioner failed to provide all his employees with W-2 or 1099 forms reporting their income to the IRS, and that the jury could fairly consider such evidence as proof of petitioner's willfulness with respect to the omissions in his own returns. Brief For Appellee, at 17-18.

Respondent's argument, although apparently accepted by the Court of Appeals, was fallacious. The trial record contains not a scintilla of support for respondent's assertion on appeal that the tax returns of defense witnesses had been offered and admitted for any purpose other than the impeachment of the witnesses' credibility. Moreover, had respondent really relied on these returns as demonstrating "prior bad acts" by the petitioner, admissible under Fed. R. Evid. 404(b) as proof of knowledge or intent, it would have been required by a pre-trial agreement to make advance disclosure of the nature of that evidence to the defense. Respondent made no such disclosures. *See* Reply Brief For Appellant, at 9-10 & Addendum (containing prosecution's pre-trial disclosure of Rule 404(b) evidence).

turns for impeachment purposes in § 6103(h) is made abundantly clear by the statute's legislative history.

Section 6103 was born in the Senate bill reported by the Finance Committee in S. Rep. No. 94-938, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 3439. In their Report, the Committee first surveyed the regulatory law then in effect, which permitted a federal prosecutor to obtain tax returns upon written application to the IRS, "where it is 'necessary in the performance of his official duties.'" This amorphous regulation had been interpreted to permit the Justice Department to obtain for use in criminal cases the tax returns of potential witnesses and other third parties. S. Rep. No. 94-938, *supra*, at 323-324, 1976 U.S. Code Cong. & Ad. News at 3753. The Committee further observed:

> "Tax returns obtained by the Justice Department generally pertain to the taxpayer whose civil or criminal tax liability is directly involved in the case. However, the Justice Department also may obtain directly from the IRS district offices tax returns of potential witnesses for the taxpayer or Government, and third parties with whom the taxpayer has had some transactional or other relationship.
>
> "The returns of witnesses generally are obtained for purposes of cross examination and impeachment. In many cases, the information obtained from the witnesses' tax return is used to cast doubt upon his credibility as a witness, as opposed to establishing the tax liability in issue."

Id. at 324, 1976 U.S. Code Cong. & Ad. News at 3754.

The Committee stated that reforms were needed particularly "with respect to the use of third-party returns where, after comparing the minimal benefits derived from the standpoint of tax administration to the potential abuse of privacy, the committee concluded that the particular disclosure involved was unwarranted." *Id.* at 325,

1976 U.S. Code Cong. & Ad. News at 3754. For these reasons, the Senate Committee reported the provisions of § 6103(h)(2), which were designed to permit disclosures to the Justice Department of a third party's tax returns only "in the event that the treatment of an item reflected on [the third party's] return is or may be relevant to the resolution of an issue of the taxpayer's liability under the Code," or "where the third party's return . . . relates or may relate to a transaction between the third party and the taxpayer . . . and the return information pertaining to that transaction may affect the resolution of an issue of the taxpayer's liability." *Id.*, 1976 U.S. Code Cong. & Ad. News at 3754-55.[5]

Turning to the provisions of § 6103(h)(4), governing the use and admission of tax returns in judicial proceedings, the Committee was clear that third-party returns could not be disclosed for impeachment purposes:

> "The disclosure of a third party return in a tax proceeding (including the U.S. Tax Court) will be subject to the same item and transactional tests de-

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[5] With respect to the "item" test of § 6103(h)(2)(B), the Committee cited as examples of permissible disclosures situations in which the returns of partnership and corporate entities may shed light on the tax liability of an individual partner or shareholder, cases involving withholding tax penalties where corporate returns are needed to demonstrate that the wages at issue were paid, and the tax treatment of alleged loans and gifts on the respective returns of the lessor or donor and the lessee or beneficiary. With respect to the "transactional relationship" test of § 6103(h)(2)(C), the Committee gave as an example disclosures to determine whether the tax treatment by a buyer concerning the nature of the business assets he purchased was different from the treatment ascribed to those assets by the seller. S. Rep. No. 94-938, *supra* at 325-326, 1976 U.S. Code Cong. & Ad. News at 3754-55. Although respondent attempted to rely on the "item" and "transactional relationship" exceptions on appeal, it is obvious that no item on the witnesses' returns, nor their employment relationship with petitioner, was related to or directly affected any issue of petitioner's tax liability. *See* footnote 4, *supra*.

scribed above, *except that such items and transactions must have a direct relationship to the resolution of an issue of the taxpayer's liability.*

"Only such part or parts of the third party's return or return information which reflects the item or transaction will be subject to disclosure both before and in a tax proceeding. *Thus, the return of a third-party witness could not be introduced in a tax proceeding for purposes of discrediting that witness except on the item and transactional grounds stated above.*"

Id. at 326, 1976 U.S. Code Cong. & Ad. News at 3755 (emphasis added).

The Conference Committee Report on the Tax Reform Act of 1976 reflects that the provisions set forth in the Senate bill, eventually enacted as § 6103(h), were approved without modification. *See* H.R. Conf. Rep. No. 94-1515, 94th Cong., 2d Sess. 482-483 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 4118, 4186-87 (describing Conference agreement). In setting forth the essential purposes and meaning of § 6103(h), the Conference Committee echoed the Senate Report. *Id.* at 477-478, 1976 U.S. Code Cong. & Ad. News at 4182.

The Court of Appeals' holding in this case apparently is the first judicial decision since the passage of the Tax Reform Act of 1976 to address the question whether federal prosecutors may obtain and use the tax returns of third-party witnesses to impeach their testimony.[6] Pre-

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[6] In *United States* v. *Sapp*, 371 F. Supp. 532 (S.D. Fla. 1974), decided prior to the 1976 amendments to the confidentiality provisions of § 6103, the court entered an order requiring the Attorney General to investigate the Justice Department's unwarranted disclosure of a subject's tax returns during the course of a grand jury investigation. In several cases decided since passage of the Tax Reform Act, appellate courts have held that the suppression of evidence is not an appropriate remedy for allegedly improper governmental disclosures of a taxpayer's own returns during the

sumably, the question has not arisen in the past because federal prosecutors and the IRS take seriously the requirements imposed by § 6103(h), and have abided by the statutory dictates. A willful disclosure of tax returns or return information not authorized by § 6103 is itself a felony, punishable by imprisonment of not more than five years, a $5,000.00 fine, or both, and a conviction carries with it the mandatory sanction of dismissal from government office or employment. *See* 26 U.S.C. § 7213(a)(1).

The Court of Appeals in this case ignored the language of the statute, ignored its legislative history, and ruled "fair and proper" governmental action that Congress had declared to be unlawful and, if committed willfully, felonious. This Court should grant plenary review of this case for two reasons: first, to correct the Court of Appeals' departure from the accepted and usual course of judicial proceedings in its failure to address in a meaningful way the violations of federal law committed dur-

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investigation or trial of alleged tax offenses. *See, e.g., United States* v. *Michaelian*, 803 F.2d 1042 (9th Cir. 1986); *United States* v. *Claiborne*, 765 F.2d 784 (9th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 1636 (1986); *Marvin* v. *United States*, 732 F.2d 669 (2d Cir. 1984); *United States* v. *Barnes*, 604 F.2d 121 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980); *United States* v. *Mangan*, 575 F.2d 32 (2d Cir.), *cert. denied*, 439 U.S. 931 (1978).

Taxpayers have achieved greater success in the context of civil actions for damages arising from IRS disclosures of confidential return information. *E.g., Huckaby* v. *United States Dep't of the Treasury*, 794 F.2d 1041, *rehearing denied*, 804 F.2d 297 (5th Cir. 1986); *Heller* v. *Plave*, 657 F. Supp. 95 (S.D. Fla. 1987); *Johnson* v. *Sawyer*, 640 F. Supp. 1126 (S.D. Tex. 1986). Recently, the Court of Appeals for the Fifth Circuit granted en banc review in a case involving the question whether a district court may condition the enforcement of an IRS summons on provisions designed to protect a target taxpayer from unauthorized disclosure of the fact that he is under criminal investigation. *United States* v. *Barrett*, 804 F.2d 1376 (5th Cir. 1986), *rehearing en banc granted*, 812 F.2d 936 (5th Cir. 1987).

ing petitioner's trial; and second, to settle the important question of federal law concerning the proper interpretation of § 6103(h) that has been decided incorrectly by that Court. Supreme Court Rule 17.1.

The Court of Appeals held, in the alternative, that petitioner had not properly preserved this issue for appeal. That alternative holding should not dissuade this Court from deciding the question presented, again for two reasons. First, this Court has not hesitated in the past to grant plenary review of close, novel and important questions of federal law that were addressed by the courts below, even if not properly preserved for review in those courts. *See, e.g., City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 257 (1981). The merits of the question presented here were fully briefed and argued by the parties in the Court of Appeals, and have been decided by that Court.

Second, even under the "plain error" standard of Fed. R. Crim. P. 52(b), the statutory violations committed at trial cry out for redress. To permit the prosecution to violate the Internal Revenue Code in an effort to obtain a conviction for federal income tax offenses constitutes a "miscarriage of justice." *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982). To fault the petitioner for the failure of his counsel and the trial court to recognize the statutory violations committed by the prosecution, when only the prosecutors and investigating agents had reason to know of the statutory commands,[7] is to turn Rule 52(b) on its head. That rule after all reflects a "careful balancing of our need to encourage *all* trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed." *Id.* at 163 (emphasis added) (footnote omitted).

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[7] *Cf. Huckaby* v. *United States Dep't of the Treasury*, 794 F.2d 1041, 1049 (5th Cir. 1986) ("[a] reasonable IRS agent can be expected to know the provisions of section[] 6103").

Petitioner submits that, viewed in the light of the entire context of this criminal trial, there are few situations imaginable that may more "seriously affect the fairness, integrity or public reputation of judicial proceedings" than the prosecution's use of confidential tax returns of defense witnesses to impeach their testimony and obtain a conviction, when those returns were acquired by the prosecution and admitted in evidence by the trial court in plain violation of federal law. *See United States* v. *Young*, 470 U.S. 1, 15 (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)). Even conceding the applicability of the "plain error" standard to this issue, the Court of Appeals erred in failing to remedy such a gross violation of petitioner's right to a fair trial. In affirming the propriety of the prosecution's conduct, the Court of Appeals has emasculated an important federal statute designed to safeguard the confidentiality of tax returns. Plenary review by this Court is fully warranted.

CONCLUSION

For the reasons stated herein, this petition for certiorari should be granted. Because the prosecution and trial court violated § 6103(h) of the Internal Revenue Code during the trial of this case, appropriate relief may include an order remanding this case to the Court of Appeals or the District Court for consideration of the effect of the statutory violations on petitioner's right to a fair trial.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-5181

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GEORGE W. MCMANUS, JR.,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore

Joseph H. Young, District Judge—(CR 86-309)

Argued: June 5, 1987 Decided: August 3, 1987

Before HALL and WILKINS, Circuit Judges, and WILLIAMS, United States District Judge for the Eastern District of Virginia, sitting by designation.

William James Murphy (Murphy & McDaniel on brief) for Appellant; Robert J. Mathias, Assistant United States Attorney (Breckingridge L. Willcox, United States Attorney on brief) for Appellee.

PER CURIAM:

Appellant appeals his conviction by a jury of income tax evasion and subscribing to a false income tax return for the tax years 1979 and 1980 in violation of Title 26, United States Code Sections 7201 and 7206(1). In his appeal, appellant argues that there are numerous grounds for reversal of his conviction. Finding no merit in any of appellant's arguments, we affirm.

McManus, a prominent Baltimore attorney, conceded that his tax returns failed to include substantial income he had received from legal fees and interest. The issue at trial was whether those omissions were caused by a willful scheme to evade taxes or by McManus' inattention to his tax returns and the negligence of his bookkeeper in maintaining and providing to the accountant the information needed to prepare complete returns. The amount allegedly earned and not reported was $543,737 for 1979 and $448,270 for 1980.

Appellant argues that there are seven grounds for reversal. First, appellant claims that he was deprived of a fair trial by the prosecution's use of tax returns of third party witnesses and the court's admission of some of those returns into evidence. We find no merit in this argument. Appellant failed to comply with Federal Rule of Evidence 103 because he failed to object in a way that stated the specific ground of objection. Thus, the disclosure issue was never raised before Judge Young. In addition to appellant's failure to preserve the issue for appeal, the limited use of the returns was fair and proper.

Second, appellant claims that he was deprived of a fair trial by the admission in evidence of a witness' immunity agreement and the circumstances surrounding that witness' own tax problems. We disagree. Relying on our opinion in *United States v. Henderson*, 717 F.2d 135 (4th Cir. 1983), the district court overruled defense objections and allowed the agreement to be put before the jury. In

Henderson, we indicated, based on *United States v. Whitehead*, 618 F.2d 523 (4th Cir. 1980), that there was "no error in permitting the government to elicit details of a plea agreement regardless of the defense's intentions concerning its use for impeachment purposes." Judge Young did not err in relying on that rule. In addition, Federal Rule of Evidence 607 permits a party to impeach its own witness, as we noted in *Henderson*. Finally, the admission of the immunity agreement and the circumstances surrounding that witness' own tax problems was not unfairly prejudicial to the defendant. On that basis, we conclude that the district court did not abuse its discretion in allowing this evidence to be put before the jury.

The defendant's third argument is that the district court erred in ruling the children's tax returns and related bank accounts admissible. We find no merit in this argument. The district court did not abuse its discretion in admitting this evidence as relevant to the issue of intent and knowledge.

The fourth argument is that the defendant was deprived of a fair trial by the government's references to the Cayman Islands. We note first that the defendant did not object at trial, thus failing to preserve this issue for appeal. In addition, the Court properly instructed the jury that statements of counsel are not evidence. Thus, we conclude that the defendant was not deprived of a fair trial by the government's references to the Cayman Islands.

The defendant's fifth argument is that the district court erred by failing to instruct the jury on a theory of the defense and by injecting an objective element into the defense of good faith reliance. Again we note that the defendant failed to preserve the issue for appeal with an adequate objection, pursuant to Federal Rule of Criminal Procedure 30. In addition, even if the objection made by defense counsel was deemed to be adequate, the instruc-

tions given by the district court fairly and completely presented the legal standard regarding the defense of good faith reliance.

Next, the defendant claims that the district court's definition of the burden of proof was unbalanced and violated due process. Although we suggest trial judges not include a definition of reasonable doubt when they instruct the jury, including such a definition does not constitute reversible error *per se*. As long as that definition conveys the concept of reasonable doubt, there is no reversible error. The instruction given by Judge Young was accurate, did not create any confusion, and did not create any impermissible lessening of the required standard of proof. In addition, the evidence fully met the burden of proof beyond a reasonable doubt. We conclude that the instruction does not constitute a violation of due process.

Finally, the defendant argues that the district court erred when it failed to instruct the jury that evidence of good character and reputation *alone* may create a reasonable doubt. In this case, the defendant did not rely on good character and reputation alone, but also claimed a lack of knowledge and intent, as well as reliance on others. Thus, based on *United States v. Foley*, 598 F.2d 1323 (4th Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980), as well as our earlier decision, *Mannix v. United States*, 140 F.2d 250, 253-54 (4th Cir. 1944), the district court was not required to give the "alone" instruction. The instructions properly allowed the jury to consider evidence of good character and reputation along with other evidence. The instructions as given provide no basis for reversal of this conviction.

The conviction of the defendant is affirmed.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-5181

UNITED STATES OF AMERICA,
Appellee,

versus

GEORGE MCMANUS, JR.,
Appellant.

On Petition for Rehearing with Suggestion for Rehearing In Banc

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ORDER

[Filed Sept. 1, 1987]

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Hall, with the concurrence of Judge Wilkins and Judge Williams, United States District Judge, sitting by designation.

For the Court,

/s/ John M. Greacen
JOHN M. GREACEN
Clerk

STATUTE INVOLVED

Section 6103(h) of the Internal Revenue Code, 26 U.S.C. § 6103(h), provides as follows:

(h) *Disclosure to certain Federal officers and employees for purposes of tax administration, etc.*—

(1) *Department of the Treasury.*—Returns and return information shall, without written request, be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for tax administration purposes.

(2) *Department of Justice.*—In a matter involving tax administration, a return or return information shall be open to inspection by or disclosure to officers and employees of the Department of Justice (including United States attorneys) personally and directly engaged in, and solely for their use in, any proceeding before a Federal grand jury or preparation for any proceeding (or investigation which may result in such a proceeding) before a Federal grand jury or any Federal or State court, but only if—

(A) the taxpayer is or may be a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability in respect of any tax imposed under this title;

(B) the treatment of an item reflected on such return is or may be related to the resolution of an issue in the proceeding or investigation; or

(C) such return or return information relates or may relate to a transactional relationship between a person who is or may be a party to

the proceeding and the taxpayer which affects, or may affect, the resolution of an issue in such proceeding or investigation.

(3) *Form of request.*—In any case in which the Secretary is authorized to disclose a return or return information to the Department of Justice pursuant to the provisions of this subsection—

(A) if the Secretary has referred the case to the Department of Justice, or if the proceeding is authorized by subchapter B of chapter 76, the Secretary may make such disclosure on his own motion, or

(B) if the Secretary receives a written request from the Attorney General, the Deputy Attorney General, or an Assistant Attorney General for a return of, or return information relating to, a person named in such request and setting forth the need for the disclosure, the Secretary shall disclose return or return the information [*sic*] so requested.

(4) *Disclosure in judicial and administrative tax proceedings.*—A return or return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration, but only—

(A) the taxpayer is a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability, in respect of any tax imposed under this title;

(B) if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding;

(C) if such return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding; or

(D) to the extent required by order of a court pursuant to section 3500 of title 18, United States Code, or rule 16 of the Federal Rules of Criminal Procedure, such court being authorized in the issuance of such order to give due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in this title.

However, such return or return information shall not be disclosed as provided in subparagraph (A), (B), or (C) if the Secretary determines that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation.

(5) *Prospective Jurors.*—In connection with any judicial proceeding described in paragraph (4) to which the United States is a party, the Secretary shall respond to a written inquiry from an attorney of the Department of Justice (including a United States attorney) involved in such proceeding or any person (or his legal representative) who is a party to such proceeding as to whether an individual who is a prospective juror in such proceeding has or has not been the subject of any audit or other tax investigation by the Internal Revenue Service. The Secretary shall limit such response to an affirmative or negative reply to such inquiry.

(6) *Withholding of tax from social security benefits.*—Upon written request of the payor agency, the Secretary may disclose available return information from the master files of the Internal Revenue Serv-

ice with respect to the address and status of an individual as a nonresident alien or as a citizen or resident of the United States to the Social Security Administration or the Railroad Retirement Board (whichever is appropriate) for purposes of carrying out its responsibilities for withholding tax under section 1441 from social security benefits (as defined in section 86(d)).

(2)

No. 87-698

In the Supreme Court of the United States

OCTOBER TERM, 1987

GEORGE W. MCMANUS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government's use of the tax returns of three defense witnesses to cross-examine them at trial constituted plain error.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 826 F.2d 1061 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1987. A petition for rehearing was denied on September 1, 1987 (Pet. App. 5a-6a). The petition for a writ of certiorari was filed on October 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of attempted income tax evasion and subscribing to a false income tax return for the tax years 1979 and 1980, in violation of 26 U.S.C. 7201 and 7206(1). Petitioner was sentenced to two years' imprisonment, fined $20,000, and

ordered to perform 2,500 hours of community service. The court of appeals affirmed. Pet. App. 1a-4a.

Evidence introduced at trial established that petitioner, a Baltimore attorney, signed and filed false and fraudulent income tax returns for the years 1979 and 1980. During those years, petitioner failed to report nearly $1,000,000 in income and evaded more than $550,000 in income taxes (Pet. App. 2a). The unreported income consisted of legal fees and commissions that petitioner earned in connection with his law practice, and interest income he earned from numerous bank accounts and certificates of deposit at six different banks in New York, Texas, Florida, and Maryland in 1979, and at ten different banks in those states in 1980. *Ibid.*; Gov't C.A. Br. 3.

Petitioner conceded that his tax returns failed to include substantial income he had received from legal fees and interest. The issue at trial was whether those omissions were caused by a willful scheme to evade taxes or by petitioner's inattention to his tax returns and the negligence of his bookkeeper in maintaining and providing to his accountant the information needed to prepare complete returns. Pet. App. 2a.

Several people who had worked for petitioner testified in support of his defense. The government used the tax returns of three of those witnesses in cross-examining them (C.A. App. 120-132), and the trial court admitted the returns of two of those witnesses into evidence (*id.* at 121-122, 132). Petitioner did not object to any of the cross-examination, and he failed to object to the admission of the returns of one of the witnesses (*id.* at 121-122). With respect to the introduction of the returns of the second witness, petitioner noted an objection, but he failed to state any grounds for that objection (*id.* at 132). With respect to the introduction of the returns of the third witness, petitioner noted an objection on the ground of

relevance, and the court declined to admit that witness's returns into evidence (*id.* at 126).

On appeal, petitioner argued that the government's use of tax returns in cross-examining witnesses violated the Tax Disclosure Act, 26 U.S.C. (& Supp. III) 6103, and deprived him of a fair trial. The court of appeals rejected that claim on the ground that petitioner did not preserve it in the district court, and that the error, if any, did not constitute plain error. In particular, the court noted that petitioner "failed to comply with Federal Rule of Evidence 103 because he failed to object in a way that stated the specific ground of objection" (Pet. App. 2a). In any event, the court held, the government's "limited use of the returns was fair and proper" (*ibid.*).

ARGUMENT

Petitioner contends that the government's limited use of the tax returns of three defense witnesses violated the Tax Disclosure Act, 26 U.S.C. (& Supp. III) 6103, and that the violation constituted plain error.

1. The Tax Disclosure Act generally prohibits the use of tax returns merely to impeach witnesses at trial. In pertinent part, the Act provides that return information of a third party may be used in a judicial proceeding relating to tax administration only "if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding" (26 U.S.C. 6103(h)(4)(B)) or "if such return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding" (26 U.S.C. 6103(h)(4)(C)).

a. The tax return information in this case was not used for general impeachment, but for much more limited pur-

poses, as the court of appeals noted (Pet. App. 2a). Of the three defense witnesses who were questioned about their tax returns, the first was an employee of petitioner's, who was asked by defense counsel on direct examination, "[d]o you report your income that you receive from [petitioner] to the Internal Revenue Service every year?" She answered that she did (VI Tr. 17). On cross-examination, the government elicited that petitioner had not given her a W-2 or 1099 form and that she had not reported any of her income from petitioner during 1979, 1980, and 1981. Her tax returns were admitted into evidence without objection in order to confirm that fact. C.A. App. 116-122.

In cross-examining the second defense witness, an attorney who had worked for petitioner and whose wife also had worked for petitioner, the government inquired about the salary petitioner paid him. The witness could not recall his salary, but he agreed that his tax return would help refresh his recollection. The witness said that the return showed the salary that he received from petitioner. When the prosecutor asked the witness whether his wife's income was reported together with his, the witness said it was not, but he was unable to say whether his wife's income had been reported anywhere on the form. The witness's returns were admitted into evidence. Petitioner's counsel objected, but stated no basis for the objection. C.A. App. 128-132.

The third witness testified that she had worked for petitioner without salary since 1967. When the government sought to introduce her tax returns to show the absence of any reported income from petitioner, defense counsel objected on relevance grounds, and the court sustained the objection. C.A. App. 125-126. Accordingly, no return information was disclosed at trial with respect to that witness.

b. Petitioner's counsel clearly opened the door to cross-examination regarding the tax returns of the first

defense witness. Petitioner had elicited on direct examination the witness's assertion that she paid taxes on all the income she received from petitioner. In fact, her tax returns showed that that was not so. Even if it otherwise would not have been proper for the government to offer her tax returns into evidence, the situation changed when petitioner's counsel elicited the false statement that the witness paid taxes on all the income she received from petitioner. Petitioner cannot be permitted to use the Tax Disclosure Act as a sword by eliciting false testimony at trial and then attempting to bar the government from correcting that false testimony by reference to tax return information on cross-examination. See generally *Harris* v. *New York*, 401 U.S. 222 (1971). Under these circumstances, it is not surprising that petitioner's counsel did not object to the government's cross-examination or the admission of the witness's tax returns.

The returns of the second defense witness were likewise offered for a legitimate purpose. The return information revealing the amount that petitioner paid his employees during the years in which petitioner is alleged to have evaded taxes "relate[d] to a transactional relationship between a person who is a party to the proceeding and the taxpayer" that "directly affect[ed] the resolution of an issue in the proceeding" (26 U.S.C. 6301(h)(4)(C)).

More generally, the manner in which petitioner's employees treated the income they earned at his law firm shed light on the disputed issue of petitioner's willfulness in evading payment of his income taxes and subscribing to false income tax returns for the years in question. The evidence at trial showed that by failing to provide certain of his employees and the Internal Revenue Service with W-2 or 1099 forms, petitioner allowed those employees to evade their income tax obligations. That evidence tended to rebut petitioner's defense that his underreporting of his

own income was merely the product of inadvertence and carelessness. Accordingly, the court of appeals was correct in concluding that the limited use of the tax return information in this case was "fair and proper" (Pet. App. 2a).

2. In any event, even if the admission of the tax returns violated Section 6103, petitioner's failure to object on that ground at trial was properly held to preclude review of the matter.

In order to preserve an evidentiary claim for appellate review, a party must make a specific objection stating the ground on which the admission of the evidence is opposed. A general objection, or an objection on different grounds, is not sufficient. Fed. R. Evid. 103(a)(1). See *United States* v. *Helmel,* 769 F.2d 1306, 1316-1317 (8th Cir. 1985); *United States* v. *Wormick,* 709 F.2d 454, 460 (7th Cir. 1983); *United States* v. *Hutcher,* 622 F.2d 1083, 1087 (2d Cir.), cert. denied, 449 U.S. 875 (1980); 21 C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5036, at 174 (1977).

Petitioner never suggested at trial that the use of the tax returns violated Section 6103(h). Consequently, petitioner is entitled to no relief unless the admission of the returns constituted "plain error." Petitioner has failed to satisfy that exacting standard, because he has failed to show that, when measured against the entire record, the claimed error seriously affected his "substantial rights" and had an unfair prejudicial impact on the jury's deliberations. *United States* v. *Young,* 470 U.S. 1, 15, 16, 17 n.14 (1985). Because the cross-examination of the three defense witnesses constituted only a small feature of the lengthy trial, the government's limited use of the third-party returns was certainly "not such as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice." *Id.* at 16.

The prohibitions in the Tax Disclosure Act are not designed to ensure a fair trial for defendants; they serve

the very different purpose of protecting the privacy of tax return information, even at some cost to the accuracy of factfinding in court proceedings. For that reason as well, the plain error doctrine should not be invoked here. The admission of the tax returns in this case, even if error, did not contribute to an unfair proceeding or an inaccurate verdict. At most, it disclosed third-party returns under circumstances in which Congress intended those returns to remain private. The sanction for such an error, if it was an error, should not be reversal of the conviction of someone other than the party whose privacy interests were violated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1988

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No. 87-698

IN THE

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GEORGE W. MCMANUS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

In the Brief for the United States in Opposition, respondent admits of the possibility that the prosecution during petitioner's trial "disclosed third party [income tax] returns under circumstances in which Congress intended those returns to remain private." Typewritten Opposition, at 7. But respondent fails to acknowledge the enormity of the prosecution's violations of the Tax Disclosure Act, 26 U.S.C. § 6103, the blatant nature of the violations, and the devastating impact those violations had on the fairness of petitioner's trial.

1. Respondent argues that the Court of Appeals correctly concluded that confidential tax return information was used during petitioner's trial in a "limited" manner

and for a "fair and proper" purpose. That purpose, according to respondent, was to "shed light on the disputed issue of petitioner's willfulness in evading payment of his income taxes . . . ." Typewritten Opposition, at 5. Respondent further asserts, without record citation, that "[t]he evidence at trial showed that by failing to provide certain of his employees and the Internal Revenue Service with W-2 or 1099 forms, petitioner allowed those employees to evade their income tax obligations," which "tended to rebut petitioner's defense that his underreporting of his own income was merely the product of inadvertence and carelessness." *Id.* Thus, respondent relies on Federal Rule of Evidence 404(b) as support for the admissibility of the third-party tax returns and return information on grounds other than general impeachment of the witnesses.[1]

This argument cannot be presented by respondent in good faith. When the argument was presented on appeal, petitioner demonstrated that it is wholly fallacious. *See* Petition for Writ of Certiorari, at 12 n.4. First, the argument is not supported by the trial record. Respondent never attempted at trial to link petitioner to the failure of any of his employees to report all their taxable income. Some of the employees in question had received W-2 forms. *See, e.g.*, App. 135. The only witness who was asked denied that petitioner knew anything about her tax practices. App. 48.

Second, in making this belated effort at justifying its violations at trial of 26 U.S.C. § 6103(h), respondent ignores the fact of an agreement between counsel made prior to trial, an agreement that reveals this argument for what it is—a desperate afterthought advanced as a

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[1] Rule 404(b) provides that evidence of other crimes, wrongs or acts, while not admissible generally to prove that a defendant acted in conformity with those prior acts, may be admissible to prove intent, knowledge, or absence of a mistake.

last resort. Prior to trial, the prosecution entered into a discovery agreement by which it promised to disclose to defense counsel in advance of trial *all* evidence it would seek to have admitted under Rule 404(b). Disclosures were in fact made. But the respondent never disclosed any intention to utilize the tax returns of petitioner's employees, or of petitioner's alleged role in their tax practices, as supposed evidence of petitioner's own intent, knowledge or willfulness.[2]

This Court should not countenance the respondent's repeated failures simply to "bite the bullet" and to acknowledge that the prosecution obtained and used third-party tax returns of defense witnesses for the sole purpose of impeaching the credibility of their trial testimony, a purpose expressly prohibited by Congress. The alternative argument the respondent now presents is not supported by the trial record, and flies in the face of respondent's pre-trial discovery agreement.

2. Respondent focuses in its Opposition on the public disclosure at trial of the tax returns of two defense witnesses. Respondent ignores the record evidence that the prosecution obtained and used confidential tax returns and return information of at least three other former employees of petitioner's law firm who testified at trial. *See* Petition for Writ of Certiorari, at 5-7. In its legal analysis of the Tax Disclosure Act, respondent wholly ignores the fact that Congress prohibited not only the public dissemination of confidential third-party returns through their admission in evidence, but also the obtaining of such returns and return information by federal

[2] The discovery agreement and the respondent's pre-trial disclosure of its Rule 404(b) evidence was attached as an Addendum to petitioner's Reply Brief filed in the Court of Appeals. In the light of this agreement, well known to respondent, it is difficult to imagine that respondent would continue to contend in this Court that the third-party tax returns were relevant to the issue of petitioner's willfulness and presented at trial for that purpose.

prosecutors. 26 U.S.C. § 6103(h)(2). *See* Petition for Writ of Certiorari, at 11. The trial record demonstrates that the prosecutors gained free access to the tax returns of all of petitioner's employees who might be called as witnesses—in wholesale violation of § 6103(h)(2) and its implementing Treasury Department regulations. *See* Treas. Reg. (26 C.F.R.) § 301.6103(h)(2) (1980).

Even at this late date respondent never has explained how the prosecution managed to arm itself with the income tax returns of potential witnesses in preparation for the trial of this case. What is clear, however, is that the violations of the Tax Disclosure Act were not "limited." They were blatant and wholesale.

3. Respondent does not mention in its Opposition that a prosecutor's violation of § 6103(h), if found to be willful, is itself a felony. 26 U.S.C. § 7213(a)(1). *See* Petition for Writ of Certiorari, at 16. And contrary to respondent's argument, the prosecution's ability to benefit at trial from its wholesale violations of § 6103(h) was terribly prejudicial to the fairness of petitioner's trial. The most critical evidence in support of petitioner's defense—including eyewitness testimony that he paid fleeting attention to the contents of his tax returns—was demolished by the impact of the prosecution's effective, but unlawful and unfair, attack on the credibility of the employee-witnesses. This attack was launched from the witnesses' own tax returns. *See* Petition for Writ of Certiorari, at 3-4. While the prosecution's technique made for effective courtroom theatrics, that technique was unlawful and unfairly prejudicial.

The Court of Appeals did not address the impact of the statutory violations at issue here on the fairness of petitioner's trial, because that Court accepted respondent's specious argument that its use of third-party tax returns at trial had been "limited, fair and proper." Respondent urges this Court to conclude that the statu-

tory violations were not sufficiently prejudicial to amount to "plain error." Typewritten Opposition, at 6. Petitioner disputes the applicability of the "plain error" standard to the prosecution's repeated violations at trial of the Tax Disclosure Act. *See* Petition for Writ of Certiorari, at 17-18. But even conceding that "plain error" applies, this Court should conclude that there are few situations likely to arise in the context of a criminal trial that more "seriously affect the fairness, integrity or public reputation of judicial proceedings" than for the prosecution to have obtained a tax conviction through repeated violations of provisions of the Internal Revenue Code that were designed by Congress to prevent the misuse and dissemination of confidential tax returns of third-party witnesses. *See United States* v. *Young*, 470 U.S. 1, 15 (1985).

Plenary review is warranted in this case to correct the Court of Appeals' erroneous construction of 26 U.S.C. § 6103(h), a construction that eviscerates this important remedial legislation of its essential purposes. Respondent's arguments seek only to divert this Court's gaze from the wholesale nature of the violations of that statute committed by the prosecution, and from the prejudicial impact those violations had on the fairness of petitioner's trial.

Respectfully submitted,

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January 7, 1988